

Introduced by Senator Ortiz

February 22, 2005

An act to amend Sections 1871.7, 1879.3, and 12921.8 of, and to add Section 12921.95 to, the Insurance Code, relating to the Insurance Commissioner.

LEGISLATIVE COUNSEL'S DIGEST

SB 706, as introduced, Ortiz. Insurance Commissioner: enforcement.

Existing law provides that it is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to specified provisions of law, or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer. Existing law allows a district attorney, the Insurance Commissioner, or any interested person to bring a civil action for a violation of these provisions.

This bill would require, in an action brought by an interested person, that the parties serve the commissioner and the local district attorney with complete copies, signed by the parties, of any settlement of the action, and would provide that no settlement shall be binding and enforceable until 25 days after the settlement has been served on the commissioner. The bill would provide that, if the commissioner has proceeded with an action, the commissioner shall be entitled to attorneys' fees and costs in addition to any judgment. The bill would require that the penalties not awarded to a private party, after satisfaction of the amount of attorneys' fees and costs incurred by the commissioner, be deposited in the General Fund and, upon appropriation, be apportioned as specified.

Existing law requires the commissioner to appoint full-time attorneys and supervisory and investigatory personnel within the Fraud Division of the Department of Insurance.

This bill would delete the reference to full-time, and would require the commissioner, in addition, to assign attorneys employed by the department and under the supervision of the department's General Counsel to advise the department's Fraud Division and for other specified purposes.

Existing law allows the commissioner to issue a cease and desist order, and to impose a fine in a specified amount, against any person acting as, or holding himself or herself out as, an insurance agent or broker without being so licensed, and against any person holding out that person as transacting, or transacting, the business of insurance without having been issued a certificate of authority.

This bill would revise the circumstances in which the commissioner may issue a cease and desist order for acts of this type, and would revise the amount of the fine that may be imposed, as specified.

The bill would provide that, in addition to any other disciplinary measures the commissioner may take, whenever the commissioner finds that a licensee's violation of specified provisions of law has resulted in loss to individual insureds or claimants, designated classes of insureds or claimants, insurers, or production agents, the commissioner may, following a hearing if one is requested, order the payment of restitution.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1871.7 of the Insurance Code is
- 2 amended to read:
- 3 1871.7. (a) It is unlawful to knowingly employ runners,
- 4 cappers, steerers, or other persons to procure clients or patients to
- 5 perform or obtain services or benefits pursuant to Division 4
- 6 (commencing with Section 3200) of the Labor Code or to
- 7 procure clients or patients to perform or obtain services or
- 8 benefits under a contract of insurance or that will be the basis for
- 9 a claim against an insured individual or his or her insurer.
- 10 (b) Every person who violates any provision of this section or
- 11 Section 549, 550, or 551 of the Penal Code shall be subject, in

1 addition to any other penalties that may be prescribed by law, to
2 a civil penalty of not less than five thousand dollars (\$5,000) nor
3 more than ten thousand dollars (\$10,000), plus an assessment of
4 not more than three times the amount of each claim for
5 compensation, as defined in Section 3207 of the Labor Code or
6 pursuant to a contract of insurance. The court shall have the
7 power to grant other equitable relief, including temporary
8 injunctive relief, as is necessary to prevent the transfer,
9 concealment, or dissipation of illegal proceeds, or to protect the
10 public. The penalty prescribed in this paragraph shall be assessed
11 for each fraudulent claim presented to an insurance company by
12 a defendant and not for each violation.

13 (c) The penalties set forth in subdivision (b) are intended to be
14 remedial rather than punitive, and shall not preclude, nor be
15 precluded by, a criminal prosecution for the same conduct. If the
16 court finds, after considering the goals of disgorging unlawful
17 profit, restitution, compensating the state for the costs of
18 investigation and prosecution, and alleviating the social costs of
19 increased insurance rates due to fraud, that such a penalty would
20 be punitive and would preclude, or be precluded by, a criminal
21 prosecution, the court shall reduce that penalty appropriately.

22 (d) The district attorney or commissioner may bring a civil
23 action under this section. Before the commissioner may bring
24 that action, the commissioner shall be required to present the
25 evidence obtained to the appropriate local district attorney for
26 possible criminal or civil filing. If the district attorney elects not
27 to pursue the matter due to insufficient resources, then the
28 commissioner may proceed with the action.

29 (e) (1) Any interested persons, including an insurer, may
30 bring a civil action for a violation of this section for the person
31 and for the State of California. The action shall be brought in the
32 name of the state. The action may be dismissed only if the court
33 and the district attorney or the commissioner, whichever is
34 participating, give written consent to the dismissal and their
35 reasons for consenting.

36 (2) A copy of the complaint and written disclosure of
37 substantially all material evidence and information the person
38 possesses shall be served on the district attorney and
39 commissioner. The complaint shall be filed in camera, shall
40 remain under seal for at least 60 days, and shall not be served on

1 the defendant until the court so orders. The local district attorney
2 or commissioner may elect to intervene and proceed with the
3 action within 60 days after he or she receives both the complaint
4 and the material evidence and information. If more than one
5 governmental entity elects to intervene, the district attorney shall
6 have precedence.

7 (3) The district attorney or commissioner may, for good cause
8 shown, move the court for extensions of the time during which
9 the complaint remains under seal under paragraph (2). The
10 motions may be supported by affidavits or other submissions in
11 camera. The defendant shall not be required to respond to any
12 complaint filed under this section until 20 days after the
13 complaint is unsealed and served upon the defendant.

14 (4) Before the expiration of the 60-day period or any
15 extensions obtained under paragraph (3), the district attorney or
16 commissioner shall either:

17 (A) Proceed with the action, in which case the action shall be
18 conducted by the district attorney or commissioner.

19 (B) Notify the court that it declines to take over the action, in
20 which case the person bringing the action shall have the right to
21 conduct the action.

22 (5) When a person or governmental agency brings an action
23 under this section, no person other than the district attorney or
24 commissioner may intervene or bring a related action based on
25 the facts underlying the pending action unless that action is
26 authorized by another statute or common law.

27 (f) (1) If the district attorney or commissioner proceeds with
28 the action, he or she shall have the primary responsibility for
29 prosecuting the action, and shall not be bound by an act of the
30 person bringing the action. That person shall have the right to
31 continue as a party to the action, subject to the limitations set
32 forth in paragraph (2).

33 (2) (A) The district attorney or commissioner may dismiss the
34 action notwithstanding the objections of the person initiating the
35 action if the person has been notified by the district attorney or
36 commissioner of the filing of the motion, and the court has
37 provided the person with an opportunity for a hearing on the
38 motion.

39 (B) The district attorney or commissioner may settle the action
40 with the defendant notwithstanding the objections of the person

1 initiating the action if the court determines, after a hearing, that
2 the proposed settlement is fair, adequate, and reasonable under
3 all the circumstances. Upon a showing of good cause, the hearing
4 may be held in camera.

5 (C) Upon a showing by the district attorney or commissioner
6 that unrestricted participation during the course of the litigation
7 by the person initiating the action would interfere with or unduly
8 delay the district attorney's or commissioner's prosecution of the
9 case, or would be repetitious, irrelevant, or for purposes of
10 harassment, the court may, in its discretion, impose limitations
11 on the person's participation, including, but not limited to, the
12 following:

- 13 (i) Limiting the number of witnesses the person may call.
- 14 (ii) Limiting the length of the testimony of those witnesses.
- 15 (iii) Limiting the person's cross-examination of witnesses.
- 16 (iv) Otherwise limiting the participation by the person in the
17 litigation.

18 (D) Upon a showing by the defendant that unrestricted
19 participation during the course of the litigation by the person
20 initiating the action would be for purposes of harassment or
21 would cause the defendant undue burden or unnecessary expense,
22 the court may limit the participation by the person in the
23 litigation.

24 (3) If the district attorney or commissioner elects not to
25 proceed with the action, the person who initiated the action shall
26 have the right to conduct the action. If the district attorney or
27 commissioner so requests, he or she shall be served with copies
28 of all pleadings filed in the action and shall be supplied with
29 copies of all deposition transcripts, at the district attorney's or
30 commissioner's expense. When a person proceeds with the
31 action, the court, without limiting the status and rights of the
32 person initiating the action, may nevertheless permit the district
33 attorney or commissioner to intervene at a later date upon a
34 showing of good cause.

35 (4) If at any time both a civil action for penalties and equitable
36 relief pursuant to this section and a criminal action are pending
37 against a defendant for substantially the same conduct, whether
38 brought by the government or a private party, the civil action
39 shall be stayed until the criminal action has been concluded at the
40 trial court level. The stay shall not preclude the court from

1 granting or enforcing temporary equitable relief during the
2 pendency of the actions. Whether or not the district attorney or
3 commissioner proceeds with the action, upon a showing by the
4 district attorney or commissioner that certain actions of discovery
5 by the person initiating the action would interfere with a law
6 enforcement or governmental agency investigation or
7 prosecution of a criminal or civil matter arising out of the same
8 facts, the court may stay discovery for a period of not more than
9 180 days. A hearing on a request for the stay shall be conducted
10 in camera. The court may extend the 180-day period upon a
11 further showing in camera that the agency has pursued the
12 criminal or civil investigation or proceedings with reasonable
13 diligence and any proposed discovery in the civil action will
14 interfere with the ongoing criminal or civil investigation or
15 proceedings.

16 (5) Notwithstanding subdivision (e), the district attorney or
17 commissioner may elect to pursue its claim through any alternate
18 remedy available to the district attorney or commissioner.

19 (g) (1) (A) If the district attorney or commissioner proceeds
20 with an action brought by a person under subdivision (e), that
21 person shall, subject to subparagraph (B), receive at least 30
22 percent but not more than 40 percent of the proceeds of the
23 action or settlement of the claim, depending upon the extent to
24 which the person substantially contributed to the prosecution of
25 the action.

26 (B) Where the action is one that the court finds to be based
27 primarily on disclosures of specific information, other than
28 information provided by the person bringing the action, relating
29 to allegations or transactions in a criminal, civil, or
30 administrative hearing, in a legislative or administrative report,
31 hearing, audit, or investigation, or from the news media, the court
32 may award those sums that it considers appropriate, but in no
33 case more than 10 percent of the proceeds, taking into account
34 the significance of the information and the role of the person
35 bringing the action in advancing the case to litigation.

36 (C) Any payment to a person under subparagraph (A) or under
37 subparagraph (B) shall be made from the proceeds. The person
38 shall also receive an amount for reasonable expenses that the
39 court finds to have been necessarily incurred, plus reasonable

attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(2) (A) If the district attorney or commissioner does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. Except as provided in subparagraph (B), the amount shall not be less than 40 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of the proceeds. *The parties shall serve the commissioner and the local district attorney with complete copies, signed by the parties, of any and all settlements of actions brought under this article. No settlement shall be binding and enforceable until 25 days after the settlement has been served on the commissioner.*

(B) If the person bringing the action, as a result of a violation of this section has paid money to the defendant or to an attorney acting on behalf of the defendant in the underlying claim, then he or she shall be entitled to up to double the amount paid to the defendant or the attorney if that amount is greater than 50 percent of the proceeds. That person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(C) *If the commissioner has proceeded with an action under this section, the commissioner shall be entitled to attorneys' fees and costs in addition to any judgment. The court shall determine the amount of attorneys' fees, including, but not limited to, fees for time expended by attorneys employed by the department, and for costs incurred. Any attorneys' fees or costs awarded to the commissioner and collected shall be deposited in the Insurance Fund. The penalties not awarded to a private party, after satisfaction of the amount of attorneys' fees and costs incurred by the commissioner, shall be deposited in the General Fund and, upon appropriation by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.*

(3) If a local district attorney has proceeded with an action under this section, one-half of the penalties not awarded to a private party, as well as any costs awarded shall go to the

1 treasurer of the appropriate county. Those funds shall be used to
2 investigate and prosecute fraud, augmenting existing budgets
3 rather than replacing them. All remaining funds shall go to the
4 state and be deposited in the General Fund and, when
5 appropriated by the Legislature, shall be apportioned between the
6 Department of Justice and the Department of Insurance for
7 enhanced fraud investigation and prevention efforts.

8 (4) Whether or not the district attorney or commissioner
9 proceeds with the action, if the court finds that the action was
10 brought by a person who planned and initiated the violation of
11 this section, that person shall be dismissed from the civil action
12 and shall not receive any share of the proceeds of the action. The
13 dismissal shall not prejudice the right of the district attorney or
14 commissioner to continue the action on behalf of the state.

15 (5) If the district attorney or commissioner does not proceed
16 with the action, and the person bringing the action conducts the
17 action, the court may award to the defendant its reasonable
18 attorney's fees and expenses if the defendant prevails in the
19 action and the court finds that the claim of the person bringing
20 the action was clearly frivolous, clearly vexatious, or brought
21 primarily for purposes of harassment.

22 (h) (1) In no event may a person bring an action under
23 subdivision (e) that is based upon allegations or transactions that
24 are the subject of a civil suit or an administrative civil money
25 penalty proceeding in which the Attorney General, district
26 attorney, or commissioner is already a party.

27 (2) (A) No court shall have jurisdiction over an action under
28 this section based upon the public disclosure of allegations or
29 transactions in a criminal, civil, or administrative hearing in a
30 legislative or administrative report, hearing, audit, or
31 investigation, or from the news media, unless the action is
32 brought by the Attorney General or the person bringing the
33 action is an original source of the information.

34 (B) For purposes of this paragraph, "original source" means an
35 individual who has direct and independent knowledge of the
36 information on which the allegations are based and has
37 voluntarily provided the information to the district attorney or
38 commissioner before filing an action under this section which is
39 based on the information.

1 (i) Except as provided in subdivision (j), the district attorney
2 or commissioner is not liable for expenses that a person incurs in
3 bringing an action under this section.

4 (j) In civil actions brought under this section in which the
5 commissioner or a district attorney is a party, the court shall
6 retain discretion to impose sanctions otherwise allowed by law,
7 including the ability to order a party to pay expenses as provided
8 in Sections 128.5 and 1028.5 of the Code of Civil Procedure.

9 (k) Any employee who is discharged, demoted, suspended,
10 threatened, harassed, or in any other manner discriminated
11 against in the terms and conditions of employment by his or her
12 employer because of lawful acts done by the employee on behalf
13 of the employee or others in furtherance of an action under this
14 section, including investigation for, initiation of, testimony for,
15 or assistance in an action filed or to be filed under this section,
16 shall be entitled to all relief necessary to make the employee
17 whole. That relief shall include reinstatement with the same
18 seniority status the employee would have had but for the
19 discrimination, two times the amount of backpay, interest on the
20 backpay, and compensation for any special damages sustained as
21 a result of the discrimination, including litigation costs and
22 reasonable attorney's fees. An employee may bring an action in
23 the appropriate superior court for the relief provided in this
24 subdivision. The remedies under this section are in addition to
25 any other remedies provided by existing law.

26 (l) (1) An action pursuant to this section may not be filed
27 more than three years after the discovery of the facts constituting
28 the grounds for commencing the action.

29 (2) Notwithstanding paragraph (1) no action may be filed
30 pursuant to this section more than eight years after the
31 commission of the act constituting a violation of this section or a
32 violation of Section 549, 550, or 551 of the Penal Code.

33 SEC. 2. Section 1879.3 of the Insurance Code is amended to
34 read:

35 1879.3. The commissioner shall appoint ~~full-time attorneys~~
36 ~~and~~ supervisory and investigatory personnel within the bureau. *In*
37 *addition, the commissioner shall assign attorneys employed by*
38 *the department and under the supervision of the department's*
39 *General Counsel to advise the department's Fraud Division, and*
40 *to further the purposes of this article and Article 1 (commencing*

1 *with Section 1871). The attorneys' duties may include*
2 *representing the commissioner and the department in civil*
3 *lawsuits pursuant to Article 1 (commencing with Section 1871).*
4 *Those persons shall be qualified by training and experience to*
5 *perform the duties of their position.*

6 *When so requested by the commissioner, the Attorney General*
7 *may assign one or more deputy attorneys general to assist the*
8 *commissioner in the performance of these duties.*

9 SEC. 3. Section 12921.8 of the Insurance Code is amended to
10 read:

11 12921.8. (a) ~~The commissioner shall have the authority to~~
12 ~~issue a cease and desist order against any person acting as, or~~
13 ~~holding himself, herself, or itself out as, an insurance agent or~~
14 ~~broker without being so licensed, and against any person holding~~
15 ~~out that person as transacting, or transacting, the business of~~
16 ~~insurance without having been issued a certificate of authority.~~
17 ~~The commissioner may issue a cease and desist order without~~
18 ~~holding a hearing prior to issuance of the order. The~~
19 ~~commissioner may impose a fine of up to five thousand dollars~~
20 ~~(\$5,000) for each day the order is violated may do the following:~~

21 *(1) Issue a cease and desist order to a person who has acted in*
22 *a capacity for which a license, registration, or certificate of*
23 *authority from the commissioner was required but not possessed.*

24 *(2) Issue a cease and desist order to a person who has aided*
25 *or abetted a person described in paragraph (1).*

26 *(3) Impose a monetary penalty, pursuant to an order to show*
27 *cause, on a person described in paragraph (1) or (2). The*
28 *monetary penalty shall be the greater of the following:*

29 *(A) Five times the amount of money received by the person for*
30 *acting in the capacity for which the license, registration, or*
31 *certificate of authority was required but not possessed.*

32 *(B) Five thousand dollars (\$5,000) for each day the person*
33 *acted in the capacity for which the license, registration, or*
34 *certificate of authority was required but not possessed. In the*
35 *absence of contrary evidence, it shall be presumed that a person*
36 *continuously acted in a capacity for which a license, registration,*
37 *or certificate of authority was required on each day from the date*
38 *of the earliest such act until the date those acts were*
39 *discontinued, as proven by the person at a hearing.*

(b) A person to whom a cease and desist order ~~is~~ *or order to show cause has been* issued, may, within seven days after service of the order, *if a hearing has not already been scheduled by the commissioner*, request a hearing by filing a request for the hearing with the commissioner. ~~Any~~ *The* hearing shall be conducted in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and the commissioner shall have all the powers granted therein.

(c) A person who has a hearing pursuant to subdivision (b) shall be entitled to have the proceedings and the order of the commissioner reviewed by means of any remedy provided by the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code).

SEC. 4. Section 12921.95 is added to the Insurance Code, to read:

12921.95. In addition to any other disciplinary measures the commissioner may take, whenever the commissioner finds that a licensee's violation of a provision of this code has resulted in loss to individual insureds or claimants, designated classes of insureds or claimants, insurers, or production agents, the commissioner may, by way of settlement or decision, following a hearing if one is requested, order the payment of restitution upon the terms and conditions that the commissioner, in the reasonable exercise of discretion, may require. Any hearing shall be conducted in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. It shall not be a defense in a private civil action that the commissioner did not order the payment of restitution to individual insureds or claimants, designated classes of insureds or claimants, insurers, or production agents pursuant to this subdivision.

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